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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Isaias Delgado,

13 Defendant.
14

No. CR-19-01094-001-TUC-JGZ (JR)

ORDER

15 Pending before the Court is Defendant's Motion for Bond Pending Appeal.
16 (Doc. 208.) The Government did not respond.

17 Defendant Isaias Delgado requests this Court to allow him to remain out of custody
18 pending appeal. On August 12, 2021, after a four-day jury trial, Delgado was convicted of
19 Engaging in the Business of Dealing Firearms without a License, in violation of 18 U.S.C.
20 §§ 922(a)(1)(A) and 924(a)(1)(D). (Doc. 143.) On August 13, 2021, the Court held a
21 forfeiture hearing and entered a Preliminary Order of Forfeiture. (Doc. 147.) Delgado
22 remained on release after his conviction, pending sentencing. The Court held a sentencing
23 hearing on June 3, 2022, heard further testimony on August 4, 2022, and held an additional
24 sentencing hearing on August 23, 2022. The Court found that the government proved by a
25 preponderance of the evidence that more than twenty-five weapons were involved in the
26 offense and sentenced Delgado to thirty-six months of incarceration followed by
27 twenty-four months of supervised release.¹ (Docs. 203, 205.) The Court entered a Final

28 ¹ Before the Court sustained the government's objection to the number of weapons that
should be used in determining the guideline range under 2K2.1(b)(1)(A), the presentence

1 Order of Forfeiture, ordering Delgado to forfeit nine firearms and permitting the United
 2 States to seek forfeiture of any of the defendant's property up to the value of \$43,521.85
 3 as a substitute asset for the value of sixteen firearms that were not seized. (Doc. 204.) On
 4 August 24, 2022, Delgado filed a notice of appeal to the Ninth Circuit. (Doc. 206.) On
 5 September 1, 2022, Delgado filed the present motion.

6 Under 18 U.S.C. § 3143(b)(1), where a person has filed an appeal after having been
 7 found guilty of an offense and sentenced to a term of imprisonment, the court "shall order
 8 that [the] person . . . be detained, unless the judicial officer finds":

9 (A) by clear and convincing evidence that the person is not likely to flee or pose
 10 a danger to the safety of any other person or the community if released under
 11 section 3142(b) or (c) of this title; and

12 (B) that the appeal is not for the purpose of delay and raises a substantial question
 13 of law or fact likely to result in—

14 (i) reversal,

15 (ii) an order for a new trial,

16 (iii) a sentence that does not include a term of imprisonment, or

17 (iv) a reduced sentence to a term of imprisonment less than the total of the
 18 time already served plus the expected duration of the appeal process.

19 18 U.S.C. § 3143(b)(1)(A)–(B).

20 **I. Flight Risk and Danger to the Community**

21 "Although danger to the community and flight risk are threshold factors under
 22 § 3143(b)(1)(A), in that context the court considers only whether the defendant has proved
 23 by clear and convincing evidence that he is 'not likely' to flee or pose a danger to others."
 24 *United States v. Garcia*, 340 F.3d 1013, 1021 n. 6 (9th Cir. 2003); *United States v. Wheeler*,
 25 795 F.2d 839 (9th Cir. 1986) (appellant/defendant has burden of showing he is not a flight
 26 risk or a danger to any person or the community).

27 In his motion, Delgado argues that he has proven by clear and convincing evidence
 28 report recommended a sentence of 21 months followed by 24 months of supervised release.
 (Doc. 200.)

1 that he is not a flight risk, nor a danger to the community, because he was on pretrial release
 2 throughout the duration of his prosecution from April 2019 through August 2022, “his
 3 pretrial services record is impeccable,” he received permission to travel to Mexico over
 4 thirty times during his prosecution, and he has strong ties to the community as the owner
 5 and manager of an IT company. (Doc. 208 at 4–5.)

6 The Court finds, by clear and convincing evidence and for purposes of the pending
 7 motion, that Delgado is not likely to flee or pose a danger to others. Delgado has been on
 8 pretrial release for approximately three years and four months without incident—including
 9 nearly one year between his conviction and sentencing. He surrendered his passport, and
 10 each time he was permitted to travel to Mexico he timely re-surrendered it. *See United*
 11 *States v. Bernot*, No. 2:08–cr–00093 KJM, 2015 WL 1530493, at *1 (E.D. Cal. April 3,
 12 2015) (surrender of passport a factor in finding defendant did not pose a flight risk). The
 13 release status report provided to the Court by Pretrial Services prior to sentencing stated
 14 that Delgado adjusted well to supervision and was compliant with release conditions, even
 15 as he faced the imposition of a significant sentence. (Doc. 197.) Because reliance on
 16 presentence compliance with release conditions alone does not meet the statutory burden,
 17 the Court also considers Delgado’s strong ties to the community through his family, and
 18 the fact that he helps manage his father’s business and manages his own IT business. *See*
 19 *United States v. Bailey*, 759 F. Supp. 685, 687 (D. Co. 1991). Delgado has satisfied the
 20 first statutory requirement.

21 **II. Substantial Question**

22 Next, the Court must determine if Delgado’s appeal is not for purpose of delay and
 23 raises a substantial question of law or fact likely to result in a favorable outcome such as
 24 reversal, an order for a new trial, or a reduced sentence less than the expected duration of
 25 the appeal process. 18 U.S.C. § 3143(b)(1)(B). The word “substantial” defines the “level
 26 of merit required in the question raised on appeal,” while the requirement that the question
 27 be “likely to result in reversal” is an inquiry into the type of question presented, not an
 28 assessment of the likelihood that a reversal will occur in the particular case. *United States*

1 v. *Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985). A substantial question is one that is
 2 non-frivolous and fairly debatable or fairly doubtful. *United States v. Garcia*, 340 F.3d
 3 1013, 1020 n. 5 (9th Cir. 2003) (citing *Handy*, 761 F.2d at 1283). It may be novel or “not
 4 readily answerable.” *Handy*, 761 F.2d at 1281.

5 Delgado presents the following thirteen issues he intends to raise on appeal:

- 6 (1) The court erred by improperly admitting the Defendant’s statements made
 7 during a custodial interrogation, without *Miranda* warnings;
- 8 (2) The Government intentionally withheld/delayed delivery of *Brady* material
 9 and exculpatory evidence, in violation of the Defendant’s Due Process rights
 10 under U.S. CONST. amend. 5, *Brady v. Maryland*, 373 U.S. 83 (1963) and
 11 its progeny.
- 12 (3) The government withheld material impeachment evidence affecting the
 13 credibility of a government witness which has a reasonable likelihood of
 14 affecting the verdict. *Giglio v. United States*, 405 U.S. 150 (1972).
- 15 (4) The court erred by improperly admitting hearsay testimony and restricting
 16 relevant cross examine [sic] in violation of the 6th Amendment;
- 17 (5) The court erred by improperly admitting prejudicial 404(b) Materials;
- 18 (6) The Government engaged in a prejudicial and inflammatory display of
 19 weapons to the jury;
- 20 (7) The government improperly altered evidence during its presentation to the
 21 jury;
- 22 (8) The court erred by permitting unqualified expert testimony without proper
 23 foundation;
- 24 (9) The Prosecutorial Misconduct, Burden Shifting, and Prejudicial Statements
 25 by the Prosecution and Government Witnesses;
- 26 (10) Improper Mens Rea in the jury instructions;
- 27 (11) The trial judge applied an enhancement for trafficking within the United
 28 States based on her assumption that only a prohibited possessor would

1 purchase a gun at above market value, a fact that was not alleged in the
2 sentencing hearings on enhancements, or the pre-sentencing report.

3 (12) The court erred by making a finding as to the number of guns under
4 2K2.1(b)(1).

5 (13) Sentencing Disparity: Similarly situated defendants were subject to disparate
6 treatment by law enforcement and much more lenient punishments by other
7 courts.

8 (Doc. 208.) Delgado argues that he “made a number of substantive legal challenges to the
9 charges and admission of evidence in this case. There is a real and substantial likelihood
10 that the Court of Appeals will reverse on one or more of these basis [sic].” (*Id.*)

11 The Court concludes that Delgado has not presented a substantial question likely to
12 result in reversal, a new trial, or a sentence lower than the expected duration of the appeals
13 process. Delgado’s first through tenth issues relate to evidentiary and due process
14 challenges to his trial. The trial issues are conclusory, vague, and not supported by factual
15 information—Delgado does not argue them any further in his motion. As such, the Court
16 cannot conclude that they are fairly debatable or fairly doubtful.

17 Delgado’s final three issues relate to his sentencing. The presentence report included
18 a guideline provision of 21-27 months and recommended a sentence of 21 months before
19 the Court sustained the government’s objection and applied a six-level enhancement. The
20 Court finds that the appeals process is not likely to last longer than 21 months; any
21 successful challenge to Delgado’s sentence is thus unlikely to result in a reduced sentence
22 shorter than the duration of the appeal process.


23 Delgado has not raised issues that are fairly debatable or fairly doubtful, and his
24 assertion that the Court of Appeals is likely to reverse is speculative. *See United States v.*
25 *Boscarino*, No. CR 10-1942-TUC-CKJ, 2017 WL 727520, at *2 (D. Ariz. February 24,
26 2017) (defendant’s “assertion that his sentence may be significantly reduced is
27 speculative.”). He has not met his burden on the second statutory requirement.

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1 Accordingly,

2 **IT IS ORDERED** that Delgado's Motion for Bond Pending Appeal (Doc. 208) is
3 **DENIED.**

4 Dated this 30th day of September, 2022.

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7 
8 Honorable Jennifer G. Zipp
9 United States District Judge
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